

# STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION  
OFFICE OF THE COMMISSIONER

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January 5, 2000

Chuck Clarke  
Chuck Findley  
EPA, Region X  
1200 Sixth Ave.  
Seattle, WA 98101

Dear Mr. Clarke and Mr. Findley,

I have reviewed your letter and Order dated December 10, 1999, prohibiting Alaska from issuing a Prevention of Significant Deterioration (PSD) permit for a new diesel engine to generate electricity at the Red Dog Mine without first obtaining EPA's written concurrence on Alaska Department of Environmental Conservation's (ADEC) determination of Best Available Control Technology (BACT) for that engine. After review and consideration of the applicable federal law, I believe that the Order is not a valid or proper exercise of EPA's authority. Further, I believe that ADEC's BACT determination is consistent with the Clean Air Act (CAA) and with state law.

The Order has significant adverse impacts on the people of the Northwest Arctic Borough, on Cominco Alaska, and on Cominco's partner, the NANA Native Regional Corporation. Moreover, the Order, and EPA's assertion of the power to coerce ADEC to select EPA's preferred technology as BACT nullifies Alaska's authority and ability to manage a predictable, consistent PSD program for which it has had EPA approval for 15 years. In addition, EPA's Order subjects ADEC employees to harsh civil and criminal penalties and sanctions for its violation, under § 113 of the CAA.

I would like to describe in more detail Alaska's grave concerns with your Order. First, I do not believe that EPA has the authority to issue such a broad Order. Under EPA's own rules and guidance, and under the EPA-approved State Implementation Plan (SIP) that is governing federal law, ADEC, not EPA, has final PSD permitting authority and the authority to make the final BACT determination for the new engine. That decision is subject to appeal under established state administrative procedures. Those procedures would have been the proper venue for EPA to question ADEC's BACT determination.

EPA issued its Order without participating in the permit issuing process or in the state's administrative process. Had EPA participated in ADEC's permitting process, and commented on the draft permit, it would have been accorded standing under state law to seek an adjudicatory hearing to review the BACT decision for the new engine. That process (unlike EPA's issuance of a §167 order) would have afforded Cominco Alaska and other interested parties the opportunity to participate in the hearing and would have provided due process. EPA's failure to comment now precludes its resort to that administrative review process. See AS 46.14.200. The courts have stated that EPA's recourse when it disagrees with a state's exercise of discretion under an approved

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program is not to issue an order countermanning the state's decision, but rather to pursue its rights under the state's administrative process. EPA should not ignore the state process and then attempt to veto the state's decision after the fact.

Second, I believe that Alaska's BACT determination is appropriate, reasonable, and authorized under the CAA. Both federal and state law provide that BACT determinations are to be based upon an analysis of "energy, environmental, and economic impacts and other costs." CAA §169(3); 18 AAC 50.990(13). EPA has chosen in its own BACT analyses to use a "top down" approach to comparing control technologies. That approach is found solely in EPA's internal guidance, and is not embodied in the CAA nor in implementing regulations. Nevertheless, ADEC has followed EPA's preferred "top down" approach in this case, and has fully explained its reasoning in the Technical Analysis Report that accompanies the permit. Yet EPA still asserts that Alaska's clearly discretionary determination of BACT "violates" the CAA, apparently just because EPA, had it written the permit, would have weighed the factors differently and chosen another control technology. I do not think that the fact that EPA may prefer a different BACT decision makes ADEC's decision a violation of the CAA.

Third, the process by which we got to this point did not demonstrate the usual good faith efforts to resolve differences that our agencies have shared in the past. Although EPA did not even enter this discussion until after the public process had concluded, ADEC held up issuance of the permit for five months to enable discussions to occur with EPA. In fact, we resolved several other issues to our mutual satisfaction, yet, inexplicably, those issues are still addressed in your Order.

Both Chuck Findley and I were trying to find a way to allow Cominco to begin its expanded operations while reserving the only remaining issue in dispute, the BACT determination for the one new diesel engine, MG#17. We had agreed that we did not want to engage in "brinkmanship" by which either EPA or the state would attempt to achieve some litigation advantage based upon the timing of any order or permit.

I proposed issuing the state permit to allow operation of all engines but MG#17. The permit, as proposed, would specifically prohibit on-site construction of MG#17 until June and also prohibit any irreversible design or equipment procurement that would prevent the installation of SCR technology until May. This would have: allowed us to continue with dispute resolution, afforded EPA the opportunity to use whatever remedy it chose if we could not reach agreement, allowed Cominco to operate, and avoided writing multiple permits for one facility. EPA rejected this proposal, apparently on the advice of their attorneys that EPA had to issue an order under §167, although the basis for that advice has never been explained.

I next proposed that if EPA believed it had to issue an order, then we could issue simultaneously both the order and the permit, with an explicit agreement that we would go through dispute resolution and, if that failed, neither side would claim any advantage or suffer any penalty due to who issued which document first. Again, EPA declined, and instead rushed to issue an Order that is unclear, incorrect, and excessively broad. By doing so, EPA has now created an impossible situation for ADEC and its responsible officials, given the potential sanctions we face for violation of the Order.

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I have carefully considered the issues EPA raised on the merits of the BACT determination, and the applicable legal authorities. I have carefully considered and weighed protection of the environment and the pros and cons of the different technologies. I have considered the importance of my responsibilities under the state's approved SIP to properly exercise my discretion to issue a PSD permit that, in my judgment, meets all applicable requirements. And, I have considered the importance to Alaska of being able to determine our own environmental and economic policy, as was envisioned by Congress in passing the Clean Air Act and setting forth the role of the states.

Accordingly, I have decided that I cannot and will not retract or render ineffective Cominco's permit, as you have ordered me to do. I am persuaded that, under Alaska's permit as written, significant deterioration will be prevented, and more control will be required of this source than EPA or any other state has required of similar sources in similar circumstances. Further, I have concluded that there is far more at stake here than a single permit if EPA can simply issue an order negating the discretionary judgement that Alaska exercises under the CAA and pursuant to EPA's approval of Alaska's PSD program, based upon no other reason than that EPA favors another technology, especially when there is no appreciable gain in the surrounding environment. Indeed, if EPA has this authority, there would be no point in a state ever assuming PSD primacy. States would simply become contractors for EPA.

Although ADEC did, in fact, issue the permit with the delayed effective date for the new engine that we had previously proposed in order to proceed with dispute resolution with EPA, it appears that our disagreement over the core issue of which agency has the legal authority to make the final BACT determination for engine MG#17 precludes our ability to continue discussions. The specter of the potential penalties ADEC faces for violation of the Order requires that this core issue be resolved first. I regret that we have reached this point, but the issuance of EPA's Order has changed the circumstances under which we have been operating. While we normally value and rely upon discussions with EPA, and we were more than willing to do so in this case, it is no longer possible to conduct reasonable discussion under the threat of such draconian sanctions.

For the reasons outlined above, I request that you retract the Order dated Dec. 10, 1999, so that we may continue our discussions on this matter. If you refuse to do so, I will seek review of the Order in the federal courts.

Sincerely,

  
Michele Brown

cc: The Honorable Ted Stevens, U.S. Senator  
The Honorable Frank Murkowski, U.S. Senator  
The Honorable Don Young, U.S. Representative  
Carol Browner, Administrator, U.S. EPA  
Charlie Curtis, NANA Regional Corporation  
Helvi Sandvik, NANA Development Corporation  
John Key, Cominco Alaska, General Manager  
John Katz, Office of the Governor, Washington D.C.

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